

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of)

Compatibility Between Cable Systems)
And Consumer Electronics Equipment)
)

PP Docket No. 00-67 /

REPLY COMMENTS OF
TIME WARNER CABLE

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Summary

The transition to digital television raises complex issues that remain best left to marketplace solutions, not government intervention. The Commission therefore should maintain a minimal role in the matters raised by this proceeding. To the extent Commission involvement should become necessary, it should heed Time Warner's concerns outlined below.

Labeling

As an example of how marketplace forces result in the best solutions, NCTA and CEA have reached an industry understanding regarding the labeling of digital equipment. Time Warner, while still concerned with the label used for digital TV devices lacking the 1394/5C interface (Digital TV - Cable Connect), believes that the Commission should support the industry agreement.

Nonetheless, Time Warner feels strongly that all digital television devices offered at retail should include the 1394/5C interface. Despite contrary assertions, the 1394/5C interface remains integral to full functionality between digital television devices and cable operators' digital services, including interactive services, at least until such time that a two-way compliant POD/host combination becomes available. It also remains vitally important so consumers can later upgrade their equipment.

Copy Protection Remains Critical

The record in this proceeding provides overwhelming support for Time Warner's belief that reliable copy protection is essential to the future of digital television. Quality digital content will remain a driving force of the successful roll-out of digital television. Without it, there will be no consumer demand for digital equipment. A more fundamental problem, however, exists -- there will be no substantial availability of quality digital content without sufficient copy protection.

Digital signals need copy protection up to the point of display. MVPDs and content providers therefore must be allowed to work together to restrict licenses for digital encryption technologies to guarantee that copy protection is carried out, and demanding that host devices designed to work with digital PODs comply with copy protection protocols is the only practical way to provide the necessary assurances. Only a licensing scheme that guarantees that digital signals will remain fully encrypted until display offers a viable solution. Consumers have no existing expectation of an ability to copy digital signals, and they will retain the ability to copy NTSC analog signals and digital signals converted to an analog format.

The Commission should maintain a policy of encouraging and facilitating marketplace discussions relating to copy protection. A DFAST licensing process that conditions such licenses on compliance with copy protection protocols fully comports with the Commission's rules. The Commission should expressly reconfirm, as it did in the Navigation Devices Report and Order and the NPRM in this proceeding, that nothing in the Act or the FCC rules prevents use of the DFAST licensing process to assure viable copy protection protocols.

Encryption of digital off-air signals

Broadcasters should not be permitted to demand that cable operators encrypt their retransmitted digital broadcast signals if such signals are not also encrypted when delivered over-the-air. The valid justification for copy protection has no application for signals that the broadcasters place in the public domain by sending such programming unencrypted to homes where that material may be freely copied.

BEFORE THE

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**REPLY COMMENTS OF
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Time Warner Cable ("Time Warner"), by its attorneys, submits these reply comments in connection with the above-captioned proceeding. The Commission should reject attempts by consumer electronics ("CE") manufacturers and others to expand this rulemaking beyond the two narrow issues raised in the NPRM. Inclusion of unrelated issues, such as whether to advance or modify the Navigation Devices deadlines, would only delay and further complicate the progress being made in the marketplace towards digital compatibility. Allowing this proceeding to become bogged down in issues currently under consideration in other ongoing Commission proceedings would be directly contrary to the Commission's stated goal that this proceeding "be completed promptly . . ."¹ As Chairman Kennard has stated, "[d]elay is simply not an option."² As detailed below, the Commission can best facilitate prompt marketplace resolution of these issues by promptly reaffirming that its navigation device rules pose absolutely no impediment to implementation of copy protection through the DFAST licensing process.

¹Notice of Proposed Rulemaking, DP Docket No. 0067 (rel. April 14, 2000) ("NPRM") at ¶ 13.

²Id., Press Statement of Chairman William Kennard, April 13, 2000.

I. GIVEN THAT THE INDUSTRIES HAVE REACHED A COMPROMISE AGREEMENT, THERE IS NO NEED FOR COMMISSION ACTION ON LABELING.

The Commission must share Time Warner's and other commenters³ disappointment with the CE manufacturers' steadfast refusal to commit to include the 1394/5C interface⁴ on their digital products. The best solution for consumers would be for CE manufacturers to include a standardized interactive digital interface, such as a 1394/5C, on all digital television devices offered for retail sale in the United States, including all new digital receivers, set-top boxes, DVDs and digital video recorders. The benefits to consumers from such inclusion are obvious, and Time Warner is hopeful that marketplace forces and consumer demand will cause CE manufacturers to include such functionality on their equipment even without such a requirement.

The importance of the 1394/5C interface should not be underestimated. Indeed, the claim by CEA "that the presence of a 1394 interface on a receiver is not essential for interactivity or two-way cable services"⁵ is simply not true. As Time Warner explained in its initial comments, without a 1394/5C interface, digital television sets will be unable to provide consumers with the full functionality of interactive digital services available from cable operators now and in the future. Such features and services include impulse pay-per-view and video on demand with one

³NAB Comments at 1; Phillips Comments at 5.

⁴As used herein, the term "1394/5C interface" refers to the DVS-194r1 specification which includes the IEEE ("Firewire") 1394 high performance serial bus interface, 5C Digital Transmission Content Protection ("DTCP") technology, and graphics support (i.e., Home Digital Network Interface, or "HDNI"), and any successor specifications that provide equivalent or superior interactive digital connectivity and graphics support.

⁵CEA Comments at 10.

button, interactive ordering and interactive electronic programming guides offered in connection with cable service.

Contrary to CEA, a digital television equipped with a POD will not, at least initially, be able to perform all of these functions. This is because, despite the combined talents of the CE and MVPD engineering community, a two-way compliant POD/host combination has yet to be developed that is capable of supporting the same level of graphics, two-way interactivity and flash memory capabilities available with a set-top box. Perhaps when such devices have been invented, the "Digital Television-Cable Interactive" label might be appropriate for devices containing either a 1394/5C interface or a fully interactive POD/host with equivalent copy protection. But until the CE and MVPD industries jointly develop such devices, the inclusion of the 1394/5C interface remains a crucial requirement.

The suggestion that the cable industry is advocating the 1394/5C interface merely so it can force consumers to continue to lease set-top boxes is equally unfounded. To the contrary, the success of the Commission's efforts to foster commercial availability of retail set-top boxes hinges on the widespread inclusion by CE manufacturers of a 1394/5C interface on digital televisions. Time Warner fully expects to meet the Commission's July 1, 2000 timetable for the availability of digital PODs. Time Warner also understands that digital set-top boxes that accept such PODs will be available for purchase by consumers as of that date. But for such a POD/set-top box combination to work with a digital TV, the 1394/5C interface is essential.⁶ If CE manufacturers

⁶Thus, contrary to Circuit City's claim, inclusion of the 1394/5C interface is not designed to "maintain the second-class status" of commercially available devices (Circuit City Comments at 8), but rather such an interface is critical to allow commercially available set-top boxes to connect to digital TV sets.

fail to ship digital TVs with the 1394/5C interface prior to July 1, 2000, any delay in the ability of consumers to take advantage of the option to purchase, rather than lease, set-top boxes must rest solely with a recalcitrant CE industry.

Finally, inclusion of the 1394/5C interface is also important for upgradeability. Given the dizzying pace of technological innovation, it is hard to imagine what the next “killer application” might be. Will consumers demand cable modems to be included in their set-top boxes? Personal digital recorders? Advanced interactive television capabilities? The CE industry seems comfortable with a world where, when new features and functions are developed, consumers have to buy new TV sets. The cable industry would like to offer consumers the option to upgrade their old sets with new features and functions offered in a set-top box. The 1394/5C interface (or perhaps an improved future generation of such interactive connectivity) is essential to such upgradeability, regardless of whether consumers elect to lease a set-top box from the cable operator or purchase a commercially available set-top box that includes any such advanced features.

Given the unfortunate reality that CE manufacturers are resisting any requirement to incorporate the 1394/5C interface on all digital television devices, Time Warner is resigned to the fact that some digital equipment (i.e., low-end receivers)⁷ will have limited functionality and

⁷In this regard, Time Warner agrees with CEA that Americans should not be forced to pay more “to get features they may not want or use” and that “[C]onsumers will not be well-served if all sets labeled as ‘cable-ready’ include expensive features that may never be used by a significant number of consumers.” CEA Comments at 11, 14. It is for that very reason that Time Warner urged, in its initial comments, that the “Digital TV-Cable Connect” label be reserved for truly low-end sets (e.g., with 13" or smaller screens and which do not include advanced functions such as picture-in-picture or on-screen guides.) It would be particularly unfair for a set with an integrated on-screen guide not to include a 1394/5C interface, thus denying the consumer a choice

interactivity with digital cable services. Thus, Time Warner joins the majority of commenters in this proceeding (including the CE manufacturers) who agreed on the importance of the next best solution, a labeling scheme that allows consumers to distinguish between those CE devices able to deliver the full functionality offered by cable operators and other MVPDs, and those devices only able to deliver a limited subset of such functionalities, services, and programming. For this reason, Time Warner fully agrees with CEA's position that:

DTV labeling, indeed, is needed in order to simplify the different levels of DTV products and to provide manufacturers and consumers with uniform terminology to ensure that consumers can make informed DTV purchasing decisions...On this issue, CEA believes that it is fundamental to give consumers the freedom to choose, and the information to make informed choices, concerning features and functionality that they want or that meet their needs in their digital audio and video equipment.⁸

Time Warner is therefore pleased that industry negotiations between NCTA and CEA have successfully produced a mutually acceptable labeling scheme. Such an agreement is an important step towards the goal of protecting consumers in the process of transitioning to digital television.

Time Warner remains concerned over the use of the label for digital TV devices lacking 1394/5C -- "Digital TV-Cable Connect." It believes there is a very real risk that the words "Cable Connect" may mislead consumers to believe that by connecting their cable service to such a device, they would be able to receive any and all of the services and functionalities available from their cable operator. Because this is not the case, making consumers aware of the disclaimer included in the labeling agreement is extremely important. Time Warner is guardedly hopeful that

to receive the competing guide available in the MVPD-supplied set-top box.

⁸CEA Comments at 9.

the CE manufacturers and retailers will see the wisdom of full disclosure to consumers and thus will take concerted action to ensure that the disclaimer is conspicuous at the point of purchase in the retail showroom. However, the Commission should in no manner undermine the important compromise built into the agreement. Despite its shortcomings, the Commission should fully endorse the agreed-upon labeling scheme.

Thus, given that marketplace negotiations have fully resolved the labeling issue, there is no need for Commission action at this time.⁹ The compromise labeling agreement must be seen as evidence that arrangements produced through private negotiations, and responsive to marketplace forces, better achieve results that are able to adapt to a rapidly evolving environment than a government imposed regulatory regime. Accordingly, the Commission should continue to pursue its policy of encouraging and facilitating discussions among the affected parties so as to achieve “comprehensive market-driven solutions.” The best way to accomplish this now is by encouraging the parties to continue to resolve technical issues through negotiation rather than by seeking government intervention, and therefore the Commission should terminate this proceeding without further action.¹⁰

⁹There does not appear to be any logical reason to extend the labeling requirements to set-top boxes. If a digital set-top box designed to work with a POD is offered for retail sale, it undoubtedly will include a 1394 connector because otherwise there would be no way for the digital signal to pass from the box to the TV set. Set-top boxes offered for lease by the MVPD, on the other hand, do not implicate the need for labeling because consumers are not being asked to purchase such devices.

¹⁰In particular, given the pace of technical advances, it would be a mistake to codify the current 1394/5C interface specifications. Rather, the marketplace should be allowed to enable these standards to continue to evolve.

II. FOR THE TRANSITION TO DIGITAL TELEVISION TO SUCCEED, IT IS ESSENTIAL FOR COPYRIGHT HOLDERS TO PROTECT AGAINST UNAUTHORIZED COPYING OF THEIR DIGITAL CONTENT.

It should be obvious from the comments that reliable copy protection is essential to the success of digital television. As the Commission recognized in the NPRM, “[w]ith a digital source, high quality copies can be made and further reproduced with virtually no degradation in quality. This has prompted content owners to express strong concerns about unauthorized reproduction of copyrighted material.”¹¹ In their comments, copyright owners unequivocally confirmed the Commission’s earlier analysis by expressing an extreme unwillingness to license any digital content absent concrete assurances that copy protection conditions in such licenses are strictly carried out by all digital CE devices and all MVPDs offering digital content. The Commission must not now ignore the chorus:

Motion Picture Association of America

“Adequate, effective content protection is ... critical to content owners, to their willingness to expose their content to the digital marketplace and develop innovations in services, and hence to the rapid deployment and adoption of digital television and to achieving its promise.”¹²

The ABC, CBS, Fox and NBC Networks

“The absence of adequate copy protection for broadcast programming will also impede the deployment of digital television service. If content suppliers are reluctant to license their programs for digital broadcast distribution because of lack of copy protection, broadcast networks and stations will not be able to provide consumers with the quality and quantity of digital programming that will stimulate the market for digital receivers.”

“Without adequate copy protection for digital broadcast television, content owners could be effectively limited to exploiting a single broadcast of any program...If such unrestricted copying and worldwide electronic transmission is possible, content owners who have traditionally relied on a number of markets or distribution ‘windows’ to recoup their

¹¹NPRM at ¶ 11.

¹²MPAA Comments at 3.

investment in programming that appears on broadcast television (such as domestic and international syndication, home video, clip licensing, etc.), will find that the value of those secondary markets has been destroyed.”¹³

Fox Entertainment Group

“Comprehensive and secure copyright protection in the digital environment is essential to the public interest. Protecting content ensures its continued availability to all consumers and preserves incentives to continue developing and producing new content in the future.”¹⁴

Metro-Goldwyn-Mayer

“As a company whose primary asset is its content, MGM does not want to be put in a position where, as a result of unprotected digital transmissions, MGM’s content is subject to (1) unauthorized serial copying free of degradation and/or (2) unauthorized dissemination over the Internet. Either of these two situations could so jeopardize our property rights as to make unpalatable the prospect of the digital transmission of our content.”¹⁵

TBS, HBO, Walt Disney Company, Fox Cable Networks, MTV

“Almost all television and motion picture programming, other than live events, depends on a distribution stream over time to recover costs. Without assurances that this intellectual property will be protected from unrestricted copying, the whole economic structure on which content owners and networks now rely will be fundamentally undermined. In particular, the incentives for content owners to move high-quality programming to digital will suffer. And without such high-quality programming, consumers will have little reason to purchase digital television sets.”¹⁶

Viacom

“[A]bsent meaningful safeguards to protect content from unauthorized reproduction and retransmission, including over the Internet, the roll out of digital television may be hampered by a well-founded reluctance on the part of content providers to risk loss or diminution of their intellectual property. . . . These developments underscore our position that without an effective content protection scheme to prevent these types of unlawful reproductions and distributions of digital content, content providers will have substantially reduced incentives to develop and make available motion pictures, television programming

¹³Networks Comments at 2-3.

¹⁴Fox Entertainment Group Comments at 5. (“Fox Comments”).

¹⁵MGM Comments at 1.

¹⁶Cable Networks Comments at 2.

and other content in digital format---- which, in turn, will further delay the willingness of consumers to make the leap to digital television.”¹⁷

No commenter can deny that the availability of quality digital content is essential to the successful roll-out of digital television.¹⁸ Without sufficient availability of digital content, there will be no consumer demand for digital equipment. But without sufficient copy protection, there will be no substantial availability of digital television content.

The framework for the Commission’s analysis is obvious -- for the transition to digital television to become a reality, it is essential that copyright holders be able to maintain reasonable control over unauthorized use or copying of any works delivered in a digital format by MVPDs. Accordingly, MVPDs and content providers must be allowed to act together to restrict licenses for digital encryption technologies to guarantee that copy protection is carried out, and requiring that any host devices manufactured to work with digital PODs comply with copy protection protocols is the only practical way to provide the necessary assurances.

CE manufacturer assertions to the contrary must be rejected. Claims that the cable industry and contract owners are somehow using the proposed DFAST license to disadvantage non-MSO provided host devices are meritless.¹⁹ As described in several comments, digital signals

¹⁷Viacom Comments at 2-3.

¹⁸Even CE interests have previously acknowledged the industry consensus on this issue: “There was agreement at the roundtable that a reasonable assortment of high value content is a critical ingredient for the successful launch of any new format ... [T]he availability of compelling movie content is essential.” Letter from W. Alan McCollough, Circuit City Stores, Inc., to Commissioner Susan Ness, Federal Communications Commission, (Dec. 28, 1999).

¹⁹This allegation by CE manufacturers is particularly disingenuous considering the absence of any DTV sets that can accept a POD. Time Warner and its counterparts have spent millions to meet the July 1, 2000 deadline requiring them to offer separate PODs for use with commercially available navigation devices. See 47 C.F.R. §76.1204. The failure of CE manufacturers to even

need to be copy protected up to the point of display.²⁰ Given that the security functions of a POD are necessarily physically separated from the display features of a host device, the only way to protect digital signals once they are passed off from the POD to the host device is through such a licensing scheme that guarantees that digital signals will be fully encrypted until display.²¹ No commenter in this proceeding suggests any other workable solution.

What is not recognized by the pro-copying commenters is that consumers' right to copy in analog format will in no manner be curtailed by the DFAST licensing inclusion. It is true that consumers have a reasonable and customary expectation of copying NTSC analog delivered content, but there is no consumer expectation or tradition of copying digital signals.²² Indeed, after the rollout of digital television, this historic ability to copy NTSC analog signals will not be curtailed. As most analog sets do now, digital television sets are likely to contain NTSC analog

submit a single television receiver that can accept a POD for Open Cable certification derails their argument that the cable industry has intentionally sabotaged the navigation device rules.

²⁰See NPRM at ¶11 ("In general, if digital content passes across an interface - whether between a television receiver and a set top box, a POD security module and a host device (e.g., a set top box or a television receiver), or some other interface - that content is susceptible to copying if the interface is unprotected.") This statement clearly reflects the Commission's understanding that any copy protection scheme must apply both to PODs and host devices. See Viacom Comments at 3; Sports Leagues Comments at 2; Fox Comments at 4.

²¹Circuit City erroneously claims that the cable industry is attempting to impose copy protection obligations on commercially available host devices that do not apply to cable operator-supplied set-top boxes. Circuit City Comments at 19. To the contrary, the cable industry has agreed to include the 1394/5C interface on any set-top box with a digital output, thus providing the identical degree of copy protection as achieved in the POD/host interface through the DFAST licensing process.

²²As several commenters note, these same concerns arise with respect to high resolution analog signals, even though no high resolution analog VCR has yet been marketed. These facts further serve to underscore that any "reasonable and customary" home video recording practices are limited to standard definition NTSC analog signals.

outputs, and consumers will be able to freely copy digital content, albeit in an NTSC analog format, using the large embedded base of consumer VCRs. Thus, an average consumer with an analog video cassette recorder would still be able to record and replay their favorite programs delivered in digital format, thus preserving their current ability to time-shift. All that will be prohibited is the unauthorized recording of perfect digital (or near perfect high-resolution analog) copies, precisely the type of copies that provide such a great risk to content producers.

Moreover, it is important to recognize that copy protection is not synonymous with an outright ban on copying. Rather, copy protection merely allows the content provider to limit authorized copying in the digital context. Under the 5C copy protection scheme, digital content can be encoded with appropriate instructions allowing “copy freely,” “copy once” or “copy never.” Thus, for example, the “copy never” instruction might be reserved for programming still in a “premium” window, whereas digital broadcast programs would be encoded either “copy freely” or “copy once,” thus extending viewers’ ability to time-shift into the digital arena. Thus, copy protection is not only important to the content provider, but it is equally important to CE manufacturers. With copy protection, copyright holders have no legitimate basis to complain about digital copying devices that respect copy protection instructions. But without copy protection, content owners will be reluctant to offer programming in a digital format, which would likely be the death knell for the demand for any digital televisions or recording devices.

For these reasons, the best that can be done in the area of licensing copy protection would be for the Commission to simply continue to pursue its policy of encouraging and facilitating discussions among the affected parties so as to achieve “comprehensive market-driven solutions.” If anything, the Commission should expressly endorse the use of the DFAST licensing process as a creative,

marketplace approach to providing the appropriate copy protection, a goal which all parties agree is essential to the successful roll-out of digital television.

III. CONTRARY TO CLAIMS OF CIRCUIT CITY AND CEA, RESERVATION OF CONDITIONAL ACCESS LICENSES TO THOSE HOST DEVICES ABLE TO HONOR COPY PROTECTION INSTRUCTIONS IS FULLY CONSISTENT WITH THE COMMISSION'S RULES.

The most serious impediment to a marketplace resolution of the copy protection issue is the baseless contention by Circuit City that the FCC's rules somehow prohibit such a result. The FCC has squarely rejected Circuit City's claim that DFAST licenses cannot be conditioned on compliance with copy protection protocols. As the Commission held in the Navigation Devices Report and Order, "[C]opy protection systems and devices that impose a limited measure of data encryption control over the types of devices that may record (or receive) video content would not be subject to the separation requirement"²³ of Section 76.1204 of the rules. Similarly, in its NPRM in this proceeding, the FCC acknowledges that effective copy protection must apply across the POD/host interface.²⁴ Thus, nothing in the FCC rules precludes the use of DFAST or other intellectual property licensing arrangements from imposing copy protection requirements on host devices.

Although there is overwhelming consensus among the parties involved in this proceeding that quality digital content must be made available to consumers if the transition from an analog

²³("Navigation Devices Report and Order"). Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, CS Docket No. 97-80, Report and Order. 13 FCC Rcd 14775 at ¶63.

²⁴NPRM at ¶11. See also "American Family Goes Digital," Remarks of FCC Commissioner Susan Ness before California Cable Television Association Western Show, Los Angeles, CA (December 16, 1999) ("[C]opy protection will only work if all of the network equipment, consumer equipment and software enable it...")

environment to a digital environment is to be successful, including Circuit City's own acknowledgment of this fact,²⁵ both Circuit City and CEA continue to argue that CE host devices cannot be required to comply with reasonable conditional access protocols, including copy protection, before they are allowed access to valuable digital content.²⁶

In perpetuating this argument, Circuit City and CEA are refusing to grant program suppliers adequate copy protection, thereby effectively foreclosing the possibility that content providers will license digital content for display on DTVs. Moreover, CEA even went so far as to insinuate that the industry is exaggerating the need for copy protection.²⁷ As described above, reliable copy protection is essential to the success of digital television. Time Warner urges the Commission to look past the unfounded claims of Circuit City and CEA and to continue to encourage and facilitate the implementation of measures that will ensure a fully effective copy protection regime.

Time Warner believes that the language of Section 76.1209 of the Commission's rules clearly provides support for MVPDs seeking protection against unauthorized copying. That provision states that nothing contained in Subpart P of the rules should be construed "to authorize or justify any use, manufacture or importation of equipment that would violate ... any ... provision of law intended to preclude the unauthorized reception of multichannel video programming

²⁵ See supra footnote 18 (Letter from W. Alan McCollough, Circuit City Stores, Inc., to Commissioner Susan Ness, Federal Communications Commission, (Dec. 28, 1999).) See also CEA Comments at n. 10 (Digital TV sales projections "are premised upon the availability of quality program content.")

²⁶ See Circuit City Comments at 18; CEA Comments at 16-17.

²⁷ See CEA Comments at 17.

service.”²⁸ Host devices that ignore copy protection instructions, therefore, would unequivocally violate Section 76.1209 by allowing unauthorized reception of multichannel video programming services. Despite this clear mandate from Congress, Circuit City argues that the Commission’s regulations limit licensing restrictions to issues of conditional access and not copy protection.²⁹

Specifically, Circuit City states that the DFAST licensing agreement is contrary to Section 76.1204(c)³⁰ of the Commission’s rules because “unless the purpose of a CE or IT device feature or function is to defeat conditional access controls or to provide unauthorized access to service, MSOs may not constrain it by license.”³¹ Time Warner agrees with Circuit City that Section 76.1204(c) limits the ability of MVPDs to restrict CE manufacturers from adding features or functions to equipment, but only to the extent the features or functions are not designed to defeat conditional access controls or to provide unauthorized service. Conditioning the DFAST license on adherence to copy protection protocols in no way inhibits the inclusion of any lawful “features or functions” in any CE or IT device, and thus such a condition is fully consistent with Section 76.1204(c).³²

²⁸ 47 C.F.R. §76.1209.

²⁹ See Circuit City Comments at 16.

³⁰ 47 C.F.R. §76.1204(c) states:

No multichannel video programming distributor shall by contract, agreement, patent, intellectual property right or otherwise preclude the addition of features or functions to the equipment made available pursuant to this section that are not designed, intended or function to defeat the conditional access controls of such devices or to provide unauthorized access to service.

³¹ See Circuit City Comments at 16.

³² Indeed, the overriding goal of the navigation device rules, as expressly stated in Section 76.1204(a)(1), is to allow consumers to purchase a commercially available TV set or set-top box that, when connected to a cable operator supplied POD, is capable of fully replicating all the

In interpreting Section 76.1204(c), CEA argues that copy protection requirements have “no relation to conditional access or protection against cable theft.” To the contrary, copy protection is in fact a form of conditional access control that prevents unauthorized access to digital programming. Time Warner submits, therefore, that DFAST licensing restrictions fall squarely within the statute and the FCC’s rules, as they prevent unauthorized access to service, namely unauthorized copying of digital content.

Circuit City further argues that Sections 76.1202³³ and 76.1203³⁴ prohibit allowing POD/DFAST licenses to be restricted to host devices capable of honoring copy protection instructions.³⁵ To the contrary, Sections 76.1202 and 76.1203 merely limit the ability of MVPDs with respect to prohibiting the distribution of devices that do not perform conditional access or security functions. Copy protection clearly falls within the definition of conditional access and is a security function. Therefore, Sections 76.1202 and 76.1203 do not limit the ability of MVPDs to prohibit the distribution of PODs that ensure copy protection instructions are followed by the host devices.

features and functions available in set-top boxes leased by the cable operator. Section 76.1204(c) prohibits MVPDs from restricting CE manufacturers from including additional features and functions in such commercially available devices. But Section 76.1204(a)(1) allows MVPDs to withhold PODs from devices that do not replicate all features and functions performed by set-top boxes leased to subscribers by the MVPD, including copy protection.

³³ 47 C.F.R. §76.1202.

³⁴ Id. at § 76.1203.

³⁵ See Circuit City Comments at 16-17.

As further evidence that the Commission's rules permit the licensing of host devices able to honor copy protection instructions, Section 76.1202, which prohibits MVPDs from preventing retailers from making available to subscribers devices that do not perform conditional access or security functions, specifically states that it is subject to the theft of services provisions in the Commission's rules.³⁶ Furthermore, Section 76.1203 permits MVPDs to restrict the use of devices that will cause physical harm to their systems or are designed or intended to assist in the unauthorized receipt of service.³⁷ The very essence of the proposed POD/DFAST license is to prevent the unauthorized receipt of service, including protecting against the unauthorized copying and distribution of digital programming. This goal is fully consistent with Sections 76.1202 and 76.1203.

³⁶ 47 C.F.R. §76.1202. This provision states:

No multichannel video programming distributor shall by contract, agreement, patent right, intellectual property right or otherwise prevent navigation devices that do not perform conditional access or security functions from being made available to subscribers from retailers, manufacturers, or other vendors that are unaffiliated with such owner or operator, subject to Section 76.1209 [theft of service].

³⁷ Id. at § 76.1203. This provision states:

A multichannel video programming distributor may restrict the attachment or use of navigation devices with its system in those circumstances where electronic or physical harm would be caused by the attachment or operation of such devices or such devices that assist or are intended or designed to assist in the unauthorized receipt of service. Such restrictions may be accomplished by publishing and providing to subscribers standards and descriptions of devices that may not be used with or attached to its system. Such standards shall foreclose the attachment or use only of such devices as raise reasonable and legitimate concerns of electronic or physical harm or theft of service. In any situation where theft of service or harm occurs or is likely to occur, service may be discontinued.

Moreover, limiting POD/DFAST licenses to CE equipment that is compliant with copy protection protocols is also consistent with Section 76.1204(a)(1) of the Commission's rules.³⁸ This provision merely requires that POD modules available after July 1, 2000 incorporate "only the conditional access functions" of any integrated set-top boxes offered for lease by the cable operator.³⁹ The rule does not require that all conditional access functions be included in the POD. It simply requires that only conditional access functions be included in the POD. This is consistent with the "handshake" concept crucial to any effective conditional access protocol, wherein certain aspects of any conditional access methodology must reside in both the POD and the host device. If it were possible for conditional access functions to reside exclusively in the POD, then no such license would be necessary. However, the fact remains that any effective conditional access scheme requires the POD and host to communicate and to work together.

In sum, if the Commission truly wishes to foster a marketplace solution to copy protection, it should reaffirm its conclusion in the Navigation Device Report and Order that nothing in the Act or FCC rules precludes the conditioning of any license for host devices to interconnect with security modules on an obligation by such host devices to comply with all conditional access functions of such security modules, including copy protection protocols.

IV. BROADCASTERS SHOULD NOT BE ALLOWED TO REQUIRE CABLE OPERATORS TO ENCRYPT RETRANSMITTED DIGITAL SIGNALS THAT ARE NOT ALSO ENCRYPTED WHEN DELIVERED OVER-THE-AIR.

As mentioned above, encryption of digital signals is vital to a successful transition to digital television. Encryption allows content providers to have the confidence to release quality

³⁸ Id. at § 76.1204(c).

³⁹ Id. at § 76.1204(c)(1).

content without the fear of losing revenue due to unauthorized copying and distribution of that content. This being said, broadcasters should not be allowed to demand that cable operators encrypt their retransmitted digital broadcast signals if such signals are not also encrypted when delivered over-the-air. The completely valid justification for copy protection of a given work breaks down once a broadcaster puts the programming in the public domain by sending the programming unencrypted to homes where that material may be freely copied. Put another way, any claim that retransmitted digital broadcast signals need to be encrypted in order to protect content producers falls apart if broadcasters are already delivering such programming in the clear, and thus unprotected from copying, when they transmit their signals off-air. When they do so, they lose the ability to mandate that retransmission of their off-air signals be encrypted by cable operators.

In their comments, broadcasters emphasized the importance of full copy protection of digital signals. They indicated, "It is critical that program content provided to consumers in a digital broadcast signal, whether received over-the-air, or over a cable wire or via satellite, be protected from unrestricted copying and electronic retransmissions outside the home."⁴⁰ This further illustrates the point that broadcasters realize the need to protect the integrity of the digital signal, not just when it reaches the cable plant, but also during the initial transmission. But if they voluntarily choose to provide such signals in the clear, they can not then use the encryption rationale to justify a demand that cable operators encrypt such programming.

As described by Time Warner in its comments, any issues relating to cable operator digital broadcast signal carriage obligations are better addressed in the digital must carry proceeding,

⁴⁰Networks Comments at 2.

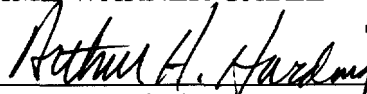
including the issue of whether encryption of a broadcaster's main DTV stream is consistent with Congressional intent. Depending on the outcome of that proceeding, many of the issues discussed above could become moot. The Commission should therefore decline to consider these issues at this time and defer a full examination of these issues to the digital must carry proceeding.

CONCLUSION

Given that the affected industries have now reached a compromise on the labeling issue, there does not appear to be any need for Commission action in this proceeding. The most the Commission should do is to monitor the situation to ensure that any digital TV sets bearing the "Digital TV-Cable Connect" label also prominently include the agreed-upon disclaimer. In the area of licensing copy protection IP, the Commission should simply continue to pursue its policy of encouraging and facilitating discussions among the affected parties so as to achieve "comprehensive market-driven solutions." In particular, the Commission should expressly endorse the use of the POD/DFAST licensing process as a creative, marketplace approach to providing the appropriate copy protection, which all parties agree is essential to the successful roll-out of digital television. Finally, the Commission should guard against efforts to expand the scope of this proceeding beyond the two, narrow technical issues raised in the NPRM. Accordingly, Time Warner urges the Commission to promptly terminate this proceeding in accordance with the principles set forth in Time Warner's comments and these reply comments.

Respectfully submitted,

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